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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No.

BLACK DIAMOND LINES, INC. and TAMPA INTER-OCEAN STEAMSHIP COMPANY,
Petitioners (Respondent-Appellant and Claimant-Appellant below),

against

PIONEER IMPORT CORP.,
Respondent (Libellant-Appellee below).

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, to review a decree of that Court entered on February 7, 1947, (R. 694) modifying a final decree of the United States District Court for the Southern District of New York, entered in favor of the respondent, and affirming the decree as so modified.

Jurisdiction.

The date of the decree of the Circuit Court of Appeals to be reviewed is February 7, 1947 (R. 694). On February 21, 1947, the respondent filed a petition for a rehearing

limited to the point as to which the decree was modified, and the petition was denied on February 27, 1947 (R. 695-700). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. § 347(a) and under General Rule 38 of this Court, § 5, subdivision (b).

Statement.

This is a suit against the steamer *Lafcomo* and her charterer, Black Diamond Lines, Inc., to recover for damage to a shipment of lily of the valley pips, hereafter, for brevity, called "pips". (The pip is the part of the plant which contains the flower bud and the leaves and it is attached to fibrous roots.) A stipulation for value was posted by Tampa Inter-Ocean Steamship Company, as owner of the *Lafcomo*. Whenever necessary, the petitioners will be called "Black Diamond" and "Tampa".

The *Lafcomo* and Black Diamond were both held liable for the damage, ultimate liability being imposed upon Black Diamond. *Pioneer Import Corp.* v. *The Lafcomo, et al.*, 49 Fed. Supp. 559 (S. D. N. Y.); affirmed, *Pioneer Import Corp.* v. *The Lafcomo,* 138 Fed. (2d) 907 (C. C. A. 2). Certiorari was denied, 321 U. S. 766.* The present petition relates solely to damages.

The pips were first booked at Rotterdam in November, 1939, with Holland America Line for carriage under refrigeration on the steamer *Statendam.* The British Government, however, announced that an embargo on German goods was about to be imposed, and the Holland America Line, fearing complications, cancelled the booking (Van Noort, T. R. 609, 610). No vessels with refrigerated space were available, so the respondent, which was anxious to get

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Page references to the first record will be preceded by "T. R." and references to the Exhibit Booklet used on the two appeals will be indicated by a "B". Otherwise all page references are to the present record.

the pips out of Holland before the embargo, chose to ship them without refrigeration.

The pips were booked with Black Diamond on November 25, 1939, for carriage on the *Lafcomo* from Rotterdam to New York. The respondent's agents, Van Es & Co., insisted that they be stowed on deck, although under deck stowage was available and was tendered (Hollaar, Dir. Int. 17, T. R. 658; Van Noort, Cross Ints. 29, 30, T. R. 618). The pips accordingly were stowed on deck and an "on deck" bill of lading was executed by Black Diamond's agents and delivered to Van Es & Co. (Finding 26, T. R. 934, 935; Ex. 7, T. R. 878).

The *Lafcomo* left Rotterdam on November 29th and arrived at New York on December 16, 1939. When the pips were discharged they were found to be wet with salt water. The damage was so extensive that it was found to be commercially unprofitable to try to grow and market the pips, so the shipment, except for a small part used in growing tests, was destroyed.

One issue at the trial was whether it was contemplated that the pips were to be covered with tarpaulins, as requested by the shipper's agents when making the booking over the telephone. The petitioners contended that the request was withdrawn after the danger of using tarpaulins was pointed out. This issue, however, was decided against the petitioners.

After the litigation on the merits was ended the questions of damages were submitted to a Special Commissioner (T. R. 947, 948).

Clause 16 of the bill of lading (R. 672) limited the carrier's liability to the invoice value of the goods. The respondent paid for the pips with 190,858.75 German marks, one-half of which were free reichsmarks and one-half blocked marks of the type called "Vorzugssperrguthaben" (Their colloquial name is "Altbesitz", meaning "old pos-

session" marks, and we shall use that term for brevity.) (R. 442, 577, 578). The petitioners therefore contended that their liability was limited to 190,858.75 marks, half free and half blocked, and that they must be converted into dollars at their current New York selling rates in December, 1939, making the invoice value $41,337.62.

Another question involved was whether these pips, carried without refrigeration, were as valuable as pips transported refrigerated and, if not, how much of a discount in value there should be.

Decisions Below.

The Commissioner held that Clause 16 was a valid limitation, and that the petitioners committed no breach of the contract which deprived them of its benefit; that the blocked marks were purchasable in New York at 3¢ to 3½¢ per mark, but that all the marks should be converted at .4033 per mark, as provided by the proclamation by the Secretary of the Treasury, dated October 1, 1939, giving that rate as the one to be used in customs declarations. On that basis invoice value worked out at $76,973.34. The Commissioner found that the New York market value of refrigerated German pips at the time was $22.50 per 1000, on which basis this shipment would be valued at $71,212.50. But he also found that unrefrigerated pips were inferior to refrigerated pips and discounted their value by 20%, thus fixing their market value at $56,970 (R. 607-619).

The District Court, on exceptions to the Commissioner's report, held Clause 16 invalid for lack of a choice of rates, following *The Merauke*, 31 Fed. (2d) 974 (C. C. A. 2), and *Kilthau* v. *International Mercantile Marine Co.*, 245 N. Y. 361; also, that the petitioners' failure to cover the pips with tarpaulins, as agreed, was a fundamental breach of the contract of carriage and hence a deviation, which de-

prived them of the benefit of Clause 16, under *The Sarnia*, 278 Fed. 459 (C. C. A. 2), and *The St. Johns, N. F.*, 280 Fed. 553 (C. C. A. 2), affirmed 263 U. S. 119. It also reversed the Commissioner's finding that the market value of the pips was $56,970. and placed it at $71,212.50 (R. 630-638). *The Lafcomo*, 64 Fed. Supp. 529 (S. D. N. Y.).

The Circuit Court of Appeals, whose opinion has not yet been officially reported, held that the contract of carriage called for stowage with tarpaulins and that by failing to cover the pips with tarpaulins the petitioners deviated fundamentally from the agreed method of transportation and therefore, under *The Sarnia* and *The St. Johns, N. F.*, *supra*, were deprived of the benefit of Clause 16. It restored the Commissioner's 20% discount, and modified the decree accordingly, affirming it as so modified (R. 691-694).

Questions Presented.

1. Where a shipper of cargo by steamer instructs the carrier to stow it on deck and the carrier does so and delivers to the shipper an "on deck" bill of lading for it, is it a deviation to fail to cover the cargo with tarpaulins, as orally requested by the shipper when it was booked?

2. Is this case governed by the decisions in *The Sarnia* and *The St. Johns, N. F., supra*?

3. Is it proper to apply the deviation doctrine to a case involving damage to cargo through ordinary negligence of the carrier?

4. Was not the sole contract for the carriage of this cargo the bill of lading?

5. Since the bill of lading contained no provision that the pips were to be covered with tarpaulins, was the ante-

cedent alleged oral understanding as to their use a part of the contract of carriage?

6. Was the decision below, construing the alleged prior oral understanding as to tarpaulins to be a part of the contract of carriage, in conflict with the decisions of this Court in *The Delaware*, 14 Wall. 579, 603, 604, and *The Thames*, 14 Wall. 98, 105?

7. Would the fact that the shipper's agents, after the booking of the cargo, drew up a so-called loading permit which noted that the cargo was to be covered, have the effect of enlarging the contract of carriage as expressed in the bill of lading?

8. Was not the so-called loading permit in any event merged in the bill of lading?

9. Is Clause 16 of the bill of lading a valid and enforceable invoice limitation clause?

10. If Clause 16 is valid, is the petitioners' liability thereby limited to 190,858.75 German marks, half free and half blocked?

11. Was inquiry into the invoice value of the pips foreclosed by the trial Court's so-called Finding 55 (T. R. 943) as to the Rotterdam cost of these pips?

12. Is the respondent now estopped from attacking Clause 16 because of its counsel's previous apparent reliance thereon?

13. What is the proper basis for converting into dollars the free German reichsmarks and the Altbesitz marks stated in the invoices? Is it the pre-war free mark rate or the selling rates on these two classes of marks at New York as of December 16, 1939?

14. Did the Commissioner decide correctly in converting the free and blocked marks into dollars at the rate of .4033 per mark, on the basis of a proclamation of that rate for customs purposes by the Secretary of the Treasury on October 1, 1939?

15. Did the Altbesitz marks, in any event, come within the proclamation of the Treasury Department?

16. Was the holding of the Commissioner as to the applicable rate of exchange contrary to this Court's decision in *Barr* v. *United States,* 324 U. S. 83?

17. Was the dollar equivalent of the two classes of marks stated in the invoices $41,337.62 as of December 16, 1939?

18. Should the petitioners' liability be limited to $41,337.62?

Specifications of Error to Be Urged.

The Circuit Court of Appeals erred:—

1. In holding that the petitioners, by failing to cover the pips with tarpaulins, committed a deviation which deprived them of the benefit of the limitation in Clause 16 of the bill of lading.

2. In holding that there was a deviation here in the face of the fact that the goods were stowed on deck by agreement and that an "on deck" bill of lading was issued therefor.

3. In holding this case to be governed by *The Sarnia,* and *The St. Johns, N. F., supra.*

4. In holding this case to be within the deviation doctrine, the damage complained of having been caused by ordinary negligence of the petitioners.

5. In holding that the contract of carriage called for stowage with tarpaulins.

6. In failing to hold that the contract was the bill of lading and that since it contained no provision as to the use of tarpaulins any antecedent oral references to tarpaulins were not a part of the contract of carriage.

7. In failing to hold that any antecedent oral understanding and any memorandum of the shipper with respect to tarpaulins were merged in the bill of lading.

8. In failing to follow this Court's decisions in *The Delaware* and *The Thames, supra,* and to hold that the contract of carriage was the bill of lading.

9. In failing to hold that the respondent is estopped from claiming a deviation now after having failed to make any such claim at the trial and having then apparently invoked Clause 16 in its own behalf.

10. In failing to hold that Clause 16 is valid and enforceable, and that the petitioners' liability thereunder is limited to the invoice value of the pips.

11. In failing to hold that inquiry into invoice value was not barred by so-called Finding 55 of the trial Judge.

12. In failing to reverse the Commissioner's holding that the invoice value of the pips was $76,973.34.

13. In failing to hold that the proclamation of the Secretary of the Treasury of October 1, 1939, fixing .4033

as the conversion rate on German marks for use on customs declarations, did not control as against the lower current selling rates on marks in the New York market.

14. In failing to hold that the Altbesitz marks did not come within the Treasury proclamation in any event.

15. In failing to follow *Barr* v. *United States*, 324 U. S. 83.

16. In failing to hold that the selling rates on free marks averaged .4013 per mark and those on Altbesitz marks averaged .031875 per mark at New York on or about December 16, 1939.

17. In failing to fix the dollar invoice value of the pips at $41,337.62 on the basis of the aforesaid selling rates and to limit the petitioners' liability to that figure.

Reasons for Granting the Writ.

1. The Court below, in holding that the petitioners committed a deviation under the facts of this case, has set up a new doctrine of deviation, far beyond anything hitherto decided, and in so doing has decided an important question of federal law which has not been, but should be, settled by this Court.

2. The Court below, in holding that *The Sarnia* and *The St. Johns, N. F., supra*, apply to this case, has improperly extended the previously prevailing deviation doctrine and its decision should therefore be passed on by this Court.

3. The decision below is erroneous in applying the deviation doctrine to a case where the cargo damage involved was caused by ordinary negligence on the part of the carrier.

4. The decision below, in depriving the petitioners of the benefit of Clause 16 because of their failure to cover the pips with tarpaulins, is in conflict with previous decisions of the lower Court in which it held claim and limitation clauses in bills of lading enforceable even though the ship had been proven unseaworthy or there had been a misdelivery of the goods. *The West Arrow,* 80 Fed. (2d) 853 (C. C. A. 2); *The J. L. Luckenbach,* 65 Fed. (2d) 570 (C. C. A. 2); *W. R. Grace & Co.* v. *Panama R. Co.* 12 Fed. (2d) 338 (C. C. A. 2); and *Bank of California, N. A.* v. *International Mercantile M. Co.,* 64 Fed. (2d) 97 (C. C. A. 2).

5. The Court below, in nullifying Clause 16, has rendered a decision which is in probable conflict with the decisions of this Court in *Davis* v. *Roper Lumber Co.,* 269 U. S. 158, *American Railway Express Company* v. *Levee,* 263 U. S. 19, and *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.,* 241 U. S. 190, wherein claim and limitation clauses were held enforceable notwithstanding a misdelivery of the goods.

6. The decision below is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Manby* v. *Union Pac. R. Co.,* 10 Fed. (2d) 327, where the Court enforced a notice clause in the bill of lading although the carrier had misdelivered four carloads of sheep.

7. The decision below, in holding that the contract of carriage called for stowage with tarpaulins, when the bill of lading contained no reference thereto, is in conflict with this Court's decisions in *The Delaware,* 14 Wall. 579, 603, 604, and *The Thames,* 14 Wall. 98, 105.

8. The Court below, in seemingly holding that the so-called loading permit was not merged in the bill of lading, has rendered a decision which is in conflict with the de-

cisions of this Court in *The Caledonia,* 157 U. S. 124, 15 Sup. Ct. Rep. 537, and the Circuit Court of Appeals for the Fifth Circuit in *Strachan Shipping Co.* v. *Alexander Eccles & Co.,* 25 Fed. (2d) 361.

A writ should be granted for the following further reasons, as the questions below listed, although not decided by the lower Court, are directly involved in the case.

9. The District Court's holding that Clause 16 was invalid because it was not supported by a choice of rates is clearly erroneous.

10. The Commissioner's holding that .4033 was the proper rate of exchange to use in converting the marks into dollars is in conflict with *Barr* v. *United States,* 324 U. S. 83, and *Edmond Weil, Inc.* v. *Commissioner of Internal Rev.,* 150 Fed. (2d) 950, 951 (C. C. A. 2).

11. The Commissioner, in holding that the Altbesitz marks should be converted at the pre-war free mark rate of .4033 on the basis of a Treasury proclamation, has decided an important question of federal law which either has been decided to the contrary in the *Barr* case, *supra,* or, if not, should be settled by this Court.

12. The Commissioner's holding that the Altbesitz marks had the same conversion value as the free reichsmarks is in evident conflict with the decision of the Court of Customs and Patent Appeals in *F. W. Woolworth Co.* v. *United States,* 115 Fed. (2d) 348.

13. The questions involved are of general interest and public importance.

WHEREFORE, your petitioners, referring to the annexed brief in support of the foregoing reasons for review, respectfully pray that this Honorable Court issue a writ of

certiorari, directing the United States Circuit Court of Appeals for the Second Circuit to certify and send to this Court a full and complete transcript of the record herein, to the end that the said cause may be reviewed and determined by this Court, as provided by law, and that the decree of the Circuit Court of Appeals may be reversed or modified, and that your petitioners may have such other and further relief as to this Honorable Court may seem just.

Dated, April 3, 1947.

BLACK DIAMOND LINES, INC. and
TAMPA INTER-OCEAN STEAMSHIP COMPANY,
Petitioners.

By—JOHN W. CRANDALL,
ARTHUR M. BOAL,
Counsel for Petitioners.

BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

Summary of Argument.

The petitioners' first point deals with the deviation question (pp. 13-16). The second point discusses the validity of Clause 16 (pp. 16-18). The third point is directed to the foreign exchange question, which involves a determination of the correct basis for converting the marks into dollars (pp. 18-25). The fourth point stresses the importance of the questions presented (pp. 25, 26).

POINT I.

The Court below, in holding that the petitioners committed a deviation which deprived them of the benefit of Clause 16, has set up a new doctrine of deviation, the correctness of which should be determined by this Court.

There is a great difference, we believe, between this case and *The Sarnia* and *The St. Johns, N. F., supra,* which the lower Court thought were controlling on the question of deviation. There the carriers issued clean bills of lading, which imported stowage under deck. By stowing the goods on deck they committed a fundamental breach of the contract. Here, the shipper demanded stowage on deck and an "on deck" bill of lading was issued and delivered (Ex. 7, T. R. 878).

The lower Court, however, held that "the contract of carriage * * * called for stowage with tarpaulins, not without" and that the failure to use tarpaulins was a

deviation (R. 692). But it was the bill of lading which was the contract, *The Delaware, supra, The Thames, supra, Dietrich* v. *U. S. S. B. E. F. C.*, 9 Fed. (2d) 733, 741 (C. C. A. 2), and it said nothing about tarpaulins.

The alleged understanding about tarpaulins was based on a telephone talk between representatives of the parties when the cargo was booked. But clearly that conversation was not a part of the contract, although it doubtless was pertinent to the negligence issue. This Court held in *The Delaware,* where a clean bill of lading was issued, that parol evidence was inadmissible to prove a prior agreement for deck stowage. It is a poor rule that does not work both ways. The alleged parol agreement here likewise cannot be a part of the contract.

The fact that the shipper's agents, following the booking, drew up a so-called loading permit (Ex. A., T. R. 897) which noted that the pips were to be covered, is immaterial. That was a purely *ex parte* act. Black Diamond did not issue the permit and, moreover, the reference to covers in the permit was not incorporated in the bill of lading. In short, the permit was merged in the final contract, which, incidentally, was prepared by the respondent's shipping agents themselves. Finding No. 14 (T. R. 931). *The Caledonia,* 157 U. S. 124, 15 Sup. Ct. Rep. 537; *Strachan Shipping Co.* v. *Alexander Eccles & Co.*, 25 Fed. (2d) 361 (C. C. A. 5). The merger point was, in fact, directly involved in *The St. Johns, N. F.* There the freight contract gave the ship-owner the option of carrying the goods on or under deck, but this option did not appear in the bill of lading. If it had there would have been no question as to the carrier's right to stow the cargo on deck.

Assuming, for argument's sake, that the present contract did provide for tarpaulins, the Court's holding that the petitioners' failure to use them vitiated Clause 16 goes counter to many decisions in analogous cases. For

example, the lower Court has upheld claim clauses where the loss of cargo was due to the ship's unseaworthiness. *The West Arrow*, 80 Fed. (2d) 853 (C. C. A. 2); *The J. L. Luckenbach*, 65 Fed. (2d) 570 (C. C. A. 2); and *W. R. Grace & Co.* v. *Panama Railroad Co.*, 12 Fed. (2d) 338 (C. C. A. 2). Also, in *Bank of California N. A.* v. *International Mercantile Marine Co.*, 64 Fed. (2d) 97 (C. C. A. 2) the Court refused to extend the *Sarnia* rule to the case of a misdelivery of a shipment of salmon. It reversed the District Court which had held, 40 Fed. (2d) 78, that the misdelivery went to the essence of the contract and vitiated the claim and valuation clauses therein. This Court also has held claim clauses enforceable in spite of the carrier's misdelivery of the goods. *Davis* v. *Roper Lumber Co.*, 269 U. S. 158; *American Railway Express Company* v. *Levee*, 263 U. S. 19; *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190; see also, *Manby* v. *Union Pac. R. Co.*, 10 Fed. (2d) 327 (C. C. A. 8).

It is contended that the test of a deviation is whether a carrier has "broken its own contract and exposed the goods to greater risk than has been agreed and thereby directly caused the loss." But this cannot be the true test, for in virtually all cases where cargo has been damaged through the carrier's fault it has been exposed to greater risks than the contract contemplated. We cite the following illustrations: Leaving a hatch open for ventilation, *Andean Trading Co.* v. *Pacific Steam Nav. Co.*, 263 Fed. 559 (C. C. A. 2); failure to close a ventilator lid, *W. T. Lockett Co.* v. *Cunard S. S. Co.*, 21 Fed. (2d) 191 (E. D. N. Y.); stowing different kinds of cargo so close together that one damages the other, 58 Corpus Juris, § 746, page 452; and a breach of the warranty of seaworthiness resulting in damage. Never has it been thought that such cases were deviations.

The present case, in the last analysis, is one for damage due to ordinary negligence. The libel alleges negli-

gence (Art. Seventh, T. R. 8) and the trial Court's finding of liability was based on negligent stowage (T. R. 922, 926). No claim of deviation was raised at the trial. It was first raised before the Commissioner (R. 410, 411) after the case had gone through two Courts. Whether the respondent is estopped from claiming a deviation now, under this Court's decision in *People of Illinois* v. *Campbell,* 91 Law Ed. 272 (No. 35, Oct. Term, 1946), will be considered in the next point (p. 18).

Because of the far reaching importance of the lower Court's decision as to deviation and the serious doubts as to its soundness we submit that it should be reviewed on certiorari.

POINT II.

The lower Court erred in failing to reverse the District Court's decision that Clause 16 was invalid for lack of a choice of rates.

The questions discussed in this and the next points were not passed on by the Circuit Court of Appeals because of its holding as to deviation. This Court, however, has held that the granting of a writ of certiorari brings the entire record before it, with power to decide the case as it was presented to the Circuit Court. *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U. S. 257, 267; *Delk* v. *St. Louis and San Francisco Railroad Co.,* 220 U. S. 580, 588; *Hamilton-Brown Shoe Co.* v. *Wolf Brothers Co.,* 240 U. S. 251, 258; *Camp* v. *Gress,* 250 U. S. 308, 318; *Langnes* v. *Green,* 282 U. S. 531, 536; and *Story Parchment Company* v. *Paterson Parchment Paper Company,* 282 U. S. 555, 567, 568. The present point is covered by assignments of error 4-9 (R. 644, 645).

Clause 16 is set forth on page 672 of the record. The Commissioner and the District Court held it to be a limi-

tation clause, *Smith* v. *The Ferncliff*, 306 U. S. 444, and *The Ansaldo San Georgio I* v. *Rheinstrom Brothers Co.*, 294 U. S. 494, and that the applicable limitation was invoice value (R. 632, 611). Since the Carriage of Goods By Sea Act, 46 U. S. C. A. § 1301(c), excludes deck cargo, any restrictions on limitation provisions therein do not apply to this case.

Black Diamond's Tariff No. 7 (Ex. J, R. 674, 675) contained a regular flower bulb rate and also an *ad valorem* rate (R. 256, 257). The Commissioner held that a choice of rates appeared on the face of the bill of lading (R. 611), we having cited to him *Cincinnati & Tex. Pac. Ry.* v. *Rankin*, 241 U. S. 319, 327; *Adams Express Company* v. *Croninger*, 226 U. S. 491, 508, 509; *Hart* v. *Pennsylvania R. Co.*, 5 Sup. Ct. Rep. 151, 154 (112 U. S. 331) and other cases. The District Court found that the tariff contained alternative rates but held that there was in effect only one rate for these pips, as in *The Merauke* and *Kilthau* cases, *supra*, saying that it was not disputed that the value of the pips did not exceed invoice value (R. 632). The statement is incorrect. No such concession was made. On the contrary, the question as to dollar invoice value was one of the principal matters in dispute.

The fixing of the invoice value depends upon what dollar values are placed on the marks (*infra*, pp. 19-25). If the invoice value was $41,337.62 there was a clear choice of rates, for the Commissioner found market value to be $56,970. If, however, invoice value actually was $76,973.34, as the Commissioner fixed it (R. 615), the various matters raised herein would be academic. The Court was not in a position to say that market value did not exceed invoice value when it failed (R. 638) to pass on our exceptions 10-21 to the Commissioner's holding as to invoice value (R. 621-623). The *Merauke* and *Kilthau* cases are not controlling because both shipped and arrived values there were below the $100. package limitation. Here, if the

marks are valued at what we believe to be the proper rates, there was a very definite choice of freight rates.

There is a serious question, moreover, whether the respondent is not estopped by the previous conduct of its counsel from questioning the validity of Clause 16 or raising the deviation question at this stage. After the trial, counsel asked the Court for a final decree for the alleged invoice cost of the goods and cross-assigned error when the request was denied (T. R. 968). This demand involved at least an implied representation, however mistaken, that Clause 16 was a valid valuation clause which fixed invoice value as the measure of damages, for invoice value would not be the standard unless there was an agreement making it so. In *People of Illinois* v. *Campbell, supra,* the State of Illinois, in its complaint on which a receiver for the debtor was appointed, alleged that the debtor was insolvent. Before this Court it sought to take a contrary position and was held estopped from doing so. A similar estoppel should be enforced against the respondent with respect to Clause 16.

It is therefore respectfully requested that this Court also review and decide the questions presented in this point in the event that a writ of certiorari is granted.

POINT III.

The lower Court erred in failing to hold that the invoice value of the pips was $41,337.62, and to limit the petitioners' liability to that figure, as provided by Clause 16.

This point was presented to the District Court by our exceptions to the Commissioner's report 10-18 and 21 (R. 621-623) and to the Circuit Court by assignments of error 20-33 (R. 647-649).

The term "invoice value" means the amounts written into the invoices as of the time of shipment. *Anchor Line* v. *Jackson*, 9 Fed. (2d) 543 (C. C. A. 2). The amounts written into the respondent's invoices were German marks, half free and half blocked.

The respondent has claimed that inquiry into this question is foreclosed by the trial Court's Finding 55 that the Rotterdam cost of the pips was $76,973.34 (T. R. 943). The answer to this contention is that the trial was confined to the merits of the case, there being no suggestion from the Court or stipulation of counsel that the *quantum* of damages be litigated also. The figure $76,973.34 was based on the rate of .4033. The respondent's counsel, as it later developed, took the figures from the respondent's warehouse entries and put them into a proposed finding. The Court, over our protest, incorporated them in Finding 55, with no evidence whatever on exchange values and no concession as to the correctness of the figures. The so-called finding is therefore either a nullity or an *obiter dictum*, and without any force in proceedings to assess damages. The *Ship Shand*, 4 Fed. 925, 926 (S. D. N. Y.); see also, *Baumgartner* v. *United States*, 322 U. S. 665, 670. The Commissioner correctly ruled that the "finding" did not bind him (R. 51-53, 58, 59).

When the German inflation following World War I was ended in 1924, the dollar exchange rate on the new German reichsmark was .2381, Germany and the United States then being on the gold standard. When the United States went off the gold standard in January, 1934, the gold rate on the free German reichsmark rose to .4033, where it remained until the outbreak of World War II (Beer, R. 388, 393, 394).

Germany commenced the regulation of foreign exchange in July, 1931, after the failure of the Darmstaedter Bank. Following a two-week Bank Holiday, an embargo was placed

on foreign exchange, which prevented payments abroad in German marks or gold without a license from the German Foreign Exchange Office (Beer, R. 383-394). When the exchange control restrictions were applied, persons residing in Germany were classed as "Devisen Inlanders", and persons outside of Germany, whether German nationals residing abroad or foreigners, were classed as "Devisen Outlanders". After the Bank Holiday, all German marks owned by Devisen Outlanders were blocked and no Outlander could thereafter dispose of such funds without a license from the German Foreign Exchange Office. Devisen Outlanders could maintain accounts only with Devisen Banks, which were designated by the German Reichsbank.

Before July, 1931, every German mark was a free mark. After that time, however, free reichsmarks were only those which were created out of fresh funds, in the form of foreign exchange or gold, brought into Germany by Devisen Outlanders and deposited in Devisen Banks. These free reichsmarks were under no restrictions whatever and were convertible in Germany into sterling or any other exchange, and could be sold against dollars in the New York market. So far as German Inlanders were concerned, however, there were no "free marks" after July, 1931, all marks possessed by them being simply German reichsmarks, with an internal value only (Beer, R. 386-388, 413, 574-577; Gareiss, R. 435, 436). The only persons who could have free reichsmarks were Outlanders (Gareiss, R. 453).

Before January 1, 1939, there were many categories of blocked marks. From then on, however, the categories were reduced to six, in one of which were the blocked marks or preferred blocked credits called "Vorzugssperrguthaben" and colloquially known as "Altbesitz" marks (*supra*, pp. 3, 4) (Gareiss, R. 431-442; Beer, R. 577, 578). This was the type of blocked mark with which the respondent paid half of the purchase price of the pips. Altbesitz

marks consisted of funds owned by an Outlander and on deposit with a Devisen Bank, provided that such funds had been credited to the Outlander out of the liquidation or sale of capital assets, such as real estate mortgages, owned by the Outlander before July 15, 1931. These marks could be used by an Outlander to buy German goods for export, if the consent of the German Foreign Exchange Office was procured in each case and a part of the purchase price paid with foreign exchange or free marks (Beer, R. 388-391).

The respondent's use of the Altbesitz marks was by permit of the German Foreign Exchange Office, dated November 15, 1939, which stipulated that 50% of the invoice amounts must be paid in freely available foreign exchange (Ex. 21, R. 665-667). These marks were in the blocked account of International Mortgage & Investment Corp. of New York (hereafter called "International"), the respondent's parent company, and represented an investment in German mortgages (Ex. 14, R. 657-660). The commercial and consular invoices (B. pp. 48-76) are in the same general form so we refer to the first set as typical. The commercial invoice (p. 50) was made out by Eurotank Handelgesellschaft M. B. H. (hereafter called "Eurotank"), an oil company (Beer, R. 580, 581), and the price is billed half in free reichsmarks and half in Altbesitz marks. The debit advices (pp. 48, 49) issued by Reichs-Kredit-Gesellschaft show the same division.

Should Clause 16 be upheld, the petitioners' liability is limited to invoice value, stated in free marks and Altbesitz marks, which must be expressed in terms of dollars in the final decree. *Liebeskind* v. *Mexican Light & Power Co. Limited,* 116 Fed. (2d) 971, 974 (C. C. A. 2). The breach of the carrier's obligation having occurred at New York, *The West Arrow,* 80 Fed. (2d) 853, 858 (C. C. A. 2), the exchange value of the marks must be taken as of December 16, 1939, the date of the vessel's arrival. *Hicks* v. *Guin-*

ness, 269 U. S. 71, 80. See also, *Guinness et al.* v. *Miller,* 299 Fed. 538, 540 (C. C. A. 2), and *Sutherland* v. *Mayer,* 271 U. S. 272, 295.

The Commissioner, as we have said, took the .4033 rate for all the marks, in reliance on the Treasury proclamation of October 1, 1939 (R. 612, 613, 615). This proclaimed rate, however, was above the New York selling rates on free marks and far above those on Altbesitz marks in December, 1939. Moreover, the proclaimed rate was the prewar gold rate (Beer, R. 388), 31 U. S. C. A. § 372, and so did not include blocked marks in any case.

When World War II broke out on September 1, 1939, the free rate fell below the gold point because the German Reichsbank could no longer support it by gold shipments to New York. It ranged from .4010 to .4016 between November 15th and December 1st (Beer, R. 404).

In *Barr* v. *United States,* 324 U. S. 83, Barr imported into New York from England woolen fabrics which he paid for with pounds purchased in New York through the Guaranty Trust Company. The British Treasury proclaimed $4.035 as the official rate on pounds sterling, but they were selling in the New York market at the "free" rate of $3.475138. The Federal Reserve Bank of New York, acting under 31 U. S. C. A. § 372(c) certified both rates to the Secretary of the Treasury. The Secretary, however, published only the "official" rate and directed the Collectors to use that rate for assessing and collecting duties. The New York Collector therefore converted the pounds into dollars at the "official" rate. Barr claimed that the conversion should have been made at the "free" rate. This Court held (p. 94) that the use of the "official" rate in assessing and collecting duties on the imports transcended the authority of the Collector and the Secretary, and that the "free" rate certified by the bank should have been used.

As for the Altbesitz marks, the rate applied by the Commissioner was over 13 times their market value in December, 1939. Blocked marks of all kinds, because of their limited utilization possibilities, sold at a heavy discount with relation to free marks in New York (Gareiss, R. 449, 450; Moosbrugger, R. 83). See also the excerpt from the publication issued by the Commerz-Und Privat-Bank in Berlin (R. 449).

An owner of an Altbesitz mark credit in Germany could not use it, except for traveling in Germany or for gifts, or for part payment of German goods provided he obtained permission from the German Government (Beer, R. 389-391; Gareiss, R. 459). To cut down his loss he was forced to get rid of his blocked marks as best he could. Any sale involving the use of these marks was therefore simply a salvage operation (Beer, R. 401, 402; Gareiss, R. 452, 453). The salvage nature of the present transaction is shown by the fact that it was, in effect, one between an oil company (Eurotank) and a mortgage and investment company (International) (Beer, R. 580, 581).

The sales value of Altbesitz marks on the New York market should constitute their exchange value. Altbesitz holdings were frequently liquidated here. Altbesitz marks, however, retained their identity as "old possession" marks only while in the hands of the original owner. The breaking of the continuity of possession by a transfer transformed them into Handelssperrmarks (Beer, R. 395, 396-402; Gareiss, R. 444, 445, 461). Handelssperrmarks, which were blocked trading marks, could be used in several ways but not for the purchase of German goods (R. 467). The liquidation value of Altbesitz marks thus was measured by the selling price of Handelssperrmarks, which ranged from 2⅞¢ to 3½¢, or an average of .031875 per mark at New York in November/December, 1939 (Beer, R. 402; Gareiss, R. 451).

The respondent's claim that the .4033 rate applies to the Altbesitz marks is based on the peculiar German currency regulations under which an Outlander could use depreciated blocked marks in part payment for German goods, while the Inlander seller, because of the Government's release of the restrictions on the marks when the deal was consummated, would receive a total number of marks with the same value to him as if they all had been free marks originally (Beer, R. 575-577). It is therefore argued that since the Inlander got marks which were all of equal value to him inside Germany, they must all be treated as of equal value when in the hands of the respondent. But this argument overlooks the respondent's status as an Outlander. When it had the marks they were free reichsmarks and Vorzugssperrguthaben (Altbesitz) marks and were so designated in the invoices and debit advices. It is *these* marks, therefore, which must be converted into dollars, and not the marks which the seller received after the metamorphosis, the latter marks having no external value. If the contention were sound there would have been no necessity for imposing countervailing duties on purchases of German goods with depreciated marks, as was done in *F. W. Woolworth Co.* v. *United States,* 115 Fed. (2d) 348 (Court of Customs and Patent Appeals). See also, 38 Opinions of Attorney General, p. 489, and 39 Opinions of Attorney General, p. 261.

The case of *Edmond Weil, Inc.* v. *Commissioner of Internal Rev.,* 150 Fed. (2d) 950 (C. C. A. 2), is a direct authority on this point. There the taxpayer purchased 50% of the stock of a Brazilian corporation with dollars and later, under a reorganization, his half of the corporate assets was transferred to a Brazilian partnership as a loan in the sum of 750,000 milreis. The result was a gain to the taxpayer. In computing the tax, the Commissioner arrived at a taxable gain of $21,583.24 by applying the official rate of exchange on milreis, .06+, instead of the commercial rate of .05+. The Tax Court, however, took the commer-

cial rate, under which the taxable gain was $14,398.84, and modified the assessment accordingly. *Edmond Weil, Inc.* v. *Commissioner,* CCH 3 TCM 844, 849. On appeal the Circuit Court (p. 951) held that the Tax Court was right.

Further cases in point are *Tillman* v. *Russo Asiatic Bank,* 51 Fed. (2d) 1023 (C. C. A. 2), and *Tillman* v. *National City Bank of New York,* 118 Fed. (2d) 631 (C. C. A. 2), dealing with accounts in Russian rubles; *Steinfink* v. *North German Lloyd S. S. Co.,* 27 N. Y. S. (2d) 918; *Branderbit* v. *Hamburg-American Line,* 31 N. Y. S. (2d) 588; *Strauss* v. *United States Lines Co.,* 42 N. Y. S. (2d) 618, in which passage transactions in German blocked marks were involved; and *Rives* v. *Duke,* 105 U. S. 132, which involved the value of Confederate currency in which two bonds were payable.

On the basis of the selling rates for these marks, namely, .4013 for the free marks, and .031875 for the Altbesitz marks, their total dollar value as of December 16, 1939, was $41,337.62. This constitutes, we submit, the true invoice value of the pips, to which the petitioners' liability should be limited.

We therefore respectfully request this Court to review and determine the questions of foreign exchange dealt with in this point, if a writ of certiorari is granted.

POINT IV.

The questions presented are of general interest and great importance.

The holding of the lower Court as to deviation sets up a doctrine so novel and with such serious implications for ship-owners and protection and indemnity underwriters in general that it cannot be let go unchallenged. Unless it is reversed it might ultimately be held applicable to many

other situations not heretofore classed as deviations. The decision is of such doubtful validity and the question so important and of such general interest that a review thereof by this Court should be had.

The foreign exchange questions, on which the validity of Clause 16 and the determination of invoice value depend, are just as important and of as much general interest as the deviation point. So far as we know, this Court has not yet passed on any transactions involving German blocked marks, and the currency questions here involved are well deserving of review by this Court.

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated, April 3, 1947.

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